United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2146

To Be Argued By
RALPH McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD H. HARNED, JR.,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

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P/S

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7170

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

MISCELLANEOUS

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----------X

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, (Hon. Judd, J.) dated October 17, 1975 dismissing petitioner-appellant's (hereafter "petitioner") petition for a writ of habeas corpus. The District Court issued two written opinions dated June 26, 1974, and October 16, 1975, reproduced as appendices C and D respectively in petitioner's appendix on appeal.

*Respondent-appellee's caption has omitted the customary "United States ex rel." See Lunz v. Henderson, 75-2079, Slip Op. 2147, 2148 fn. 1, ___ F 2d ___, 2d Cir., Feb. 26, 1976.

Statement of the Case

A. Arrests and Indictments

In November, 1969, petitioner was arrested in Nassau County on a complaint alleging rape and sodomy. Upon arraignment, petitioner was released on bail. On January 27, 1970, petitioner was indicted for rape in the first degree, sodomy in the first degree, sexual abuse in the first degree and assault in the second degree (hereafter "first indictment").

Approximately one year later in January, 1971, petitioner was again arrested this time on charges of rape and burglary. These charges were unconnected with the November, 1969, charges. In April, 1971, an indictment was handed down charging petitioner with rape in the first degree, burglary in the first degree, and possession of burglar's tools (hereafter "second indictment").

Petitioner remained at liberty from his first arrest in November, 1969, until his second arrest more than a year later in January, 1971.

B. Plea of Guilty

On June 23, 1971, before Nassau County Court Judge Francis X. Altimari, petitioner entered a plea of guilty to first degree burglary in the second indictment. The plea was in full satisfaction of both the first and second indictments. At the time of the guilty plea, petitioner had been incarcerated some five months.

In pleading, petitioner stated that he had consulted with his attorneys and parents about the plea; that no promise or threats had been made in regard to the plea; that he was pleading of his own free will; that he knew he was pleading to burglary in the first degree; that he understood the nature of the proceedings; that he was pleading to minimize his possible exposure to severe punishment on two indictments; that he knew he would not receive in excess of fifteen years as a sentence; that he knew he was entitled to a trial on each indictment, at which trial he was entitled to examine and cross-examine witnesses against him; and that he would rather enter his plea to one indictment (in satisfaction of both) than stand trial. See Appendix F2-8.

Petitioner then admitted that he entered unlawfully a certain dwelling in Nassau County with intent to commit a crime therein. The following exchanges then occurred:

"THE COURT: It is alleged here that the crime that you intended to commit was rape. You understand that?

PETITIONER: Yes, sir.

THE COURT: Was there an attempt to commit the rape?

PETITIONER: It was an intent.

* * *

THE COURT: All right. So you went to the house unlawfully; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You had no invitation?

THE DEFENDANT: Yes, sir.

THE COURT: It was night time?

THE DEFENDANT: Yes, sir.

THE COURT: Did you know these people at all?

THE DEFENDANT: No, sir.

THE COURT: So you went into a strange house at night. Did you break through?

THE DEFENDANT: Yes, sir.

THE COURT: How did you break in?

THE DEFENDANT: Through a window.

THE COURT: So you were in that house for the purpose of committing a crime; is that correct?

THE DEFENDANT: Yes, sir."

The petitioner then stated he was not guilty of the charges under the first indictment. At this point the court again asked petitioner if he understood that the plea to the second indictment was also in satisfaction of the first indictment. Petitioner replied in the affirmative. Appendix F12. The court went on to inquire (F 12):

"THE COURT: ....Is there any question in your mind that you are guilty of the burglary?

PETITIONER: Of the burglary, no."

Petitioner was again told that the plea covered all charges, and was told further the plea was not an admission of rape and was not an admission to the first indictment. Appendix F-14.

During the plea, petitioner expressed a desire to know in which order the indictments would be tried. F-6. The Court indicated that the order of the trial was up to the prosecutor, but that the order would be changed if good cause be shown. The Court also indicated that the oldest indictment should be tried first. Appendix F-7. At this point, petitioner's counsel interrupted to state that there had been extensive discussions with the prosecutor on the priority of the trials, and that it was "our understanding" (emphasis added) that the second indictment would be tried first.

C. Motion to Withdraw Plea

Petitioner promptly attempted to withdraw his plea. In a letter dated June 30, 1971, to Judge Altimari,* petitioner set forth the following reasons why he wished to withdraw the plea: (1) his attorneys told him if he did not plead he would be tried shortly on the indictments in reverse sequence; (2) his parents threatened to withdraw their financial support in paying legal fees to his attorneys, and

*Petitioner's Appendix G. The table of contents in petitioner's appendix describes this letter-exhibit as "recreated from appellant's contemporaneous, handwritten notes."

(3) he was forced to plead for fear of longer incarceration. Petitioner then stated in the letter that he did not want a trial on the "latter charges" (presumably the second indictment), but that he wanted a trial on the "earliest charges" (presumably the first indictment). Petitioner apparently felt that a conviction on the second indictment might prejudice him in his trial on the first indictment.

Judge Altimari then ordered a hearing on the motion to withdraw the plea. A hearing was held on October 29, 1971, in which petitioner was represented by counsel.*

Petitioner's mother testified that on the date of petitioner's plea, she and her husband told petitioner to take what was offered because they had just given a lawyer $5,000; her husband was ill and the bank account was depleted. Appendix H-5. She also said that petitioner's attorneys had recommended the plea. Appendix H-8.

*Petitioner's counsel opposed a hearing on the motion. Appendix H-3.

Petitioner testified that on the day of the plea his father was outraged and his mother was crying. He testified he told both his parents and his attorneys that he was not taking the plea, but that his father told him they had no more money. Appendix H-10.

Petitioner on direct examination testified that in pleading he knew he would be incarcerated for almost fifteen years, but that he had agreed to plead guilty only because he had been told to plead guilty. He claimed he did not understand the elements of burglary or the "legal implications" of his answers given on the plea. Appendix H-11-12.

On cross-examination, petitioner gave the following reasons for wishing to withdraw his plea: (1) he was not guilty of burglary in the first degree and (2) he wished a trial on the first indictment. He said he couldn't think of any other reasons. Appendix H-14-15. Petitioner admitted taking the recommendation of his attorneys to plead guilty, but claimed that this was because he had "no choice." Appendix H-15. He claimed this was because of the order in which the indictments were to be tried. Appendix H-24.

Petitioner admitted on cross-examination that he pleaded in order to avoid the possibility of an extended sentence beyond what was being offered; that he knew the plea covered two indictments; that on at least one indictment (the second) he had no defense; that he understood the charges against him; and that he had discussed the case with counsel "more than five times." See Appendix H-21-24, 32-33.

Petitioner testified further that he had heard of an organization called the Legal Aid Society, but had heard "rumors" in jail that they were incompetent. Appendix H-30-31.

The conduct of petitioner's two trial counsel was not raised in the hearing, and they were not summoned as witnesses. On at least three occasions during the hearing on the motion to withdraw the plea, petitioner's counsel at the hearing objected to questions concerning communications between petitioner and his two trial counsel. Appendix H-6, 7, 16, 34.

D. Decision of the Nassau County Court on the Motion to Withdraw the Plan

On December 23, 1971, Judge Altimari denied petitioner's motion to withdraw the plea in a well-reasoned and thorough four page opinion.* Appendix I.

Following the denial of petitioner's motion, petitioner was sentenced on January 7, 1972. On direct appeal the conviction was affirmed by the Appellate Division. People v. Harned, 40 A D 2d 952, 337 N.Y.S. 2d 995 (2d Dept. 1972). Leave to appeal to the State Court of Appeals was denied January 29, 1973.

E. Petition for a Federal Writ of Habeas Corpus

Petitioner then sought pro se a federal writ of habeas corpus in a petition sworn to July 17, 1973. In this petition, Harned urged two points. First, he argued that he was deprived of his right to a speedy trial on the first

*Respondent argued below that the findings of fact and conclusions of law in this opinion were entitled to a presumption of correctness. 28 U.S.C. § 2254(d). The District Court ignored this argument. Petitioner's counsel in the District Court ignored the argument. Petitioner's counsel on this appeal has ignored the argument. Respondent however still adheres to that position.

indictment. Second, he claimed that his guilty plea was involuntary as the result of duress, coercion, and equivocation.

F. First Opinion of the District Court

On June 26, 1974, the District Court issued its first opinion in this case. The Court dismissed the speedy trial claim, finding that the delay did not reach constitutional proportions under the Barker v. Wingo (407 U.S. 514, 1972) tests and that the guilty plea was a waiver of non-jurisdictional defects.

As to the guilty plea, however, the District Court in essence dismissed the petition for failure to exhaust available state remedies. The Court thought that the state court had not had an opportunity to consider the conduct of petitioner's attorneys, the extent of corroborating evidence, or the "fact" that petitioner's admissions at his plea established only burglary in the second degree and not burglary in the first degree.

G. Petitioner's Return to the State Courts to Exhaust State Remedies

Petitioner then returned to the state courts, and in July, 1974, made a motion to vacate his judgment of conviction. Petitioner argued that his plea was invalid for essentially the same reasons as set forth in his motion to withdraw his plea and first federal petition for habeas corpus, with the exception that petitioner for the first time now specifically alleged "abandonment" by his two trial attorneys.*

On November 14, 1974, petitioner's motion was denied by the Nassau County Court, Tomson, J. Appendix J. The Appellate Division denied leave to appeal January 28, 1975.

H. Renewal of Federal Petition for Habeas Corpus

Petitioner returned to federal court to renew his federal petition for habeas corpus. The respondent again

*This motion and supporting papers does not appear in petitioner's appendix. The abandonment claim appears to have been a result of the District Court's suggestion that there was such a claim. The motion and supporting papers are annexed for the convenience of the Court as Appellee's Appendix.

opposed the petition, at which point the District Court appointed counsel. The case was again briefed by both sides, by respondent for the third time.

This time, petitioner's counsel, on behalf of petitioner, urged essentially two reasons for granting the writ. First, the plea minutes allegedly showed only facts necessary to establish burglary in the second degree, in that the element of physical injury, which is an element of burglary in the first degree, was not made out.* In such circumstances, it was argued, the plea could be valid only if the North Carolina v. Alford, (400 U.S. 25, 1970) and People v. Serrano, (15 N Y 2d 304, 1965) cases were explicitly referred to in the plea colloquy. Second,

* At petitioner's hearing on the motion to withdraw his plea, at which hearing petitioner was represented by counsel, petitioner claimed the missing element he did not understand was intent. Appendix H, 13-14. Nothing was ever said at this hearing about physical injury. By now it should be clear that petitioner's claims in this case have fluctuated substantially over time.

petitioner argued that his attorneys refused to defend him at trial*, and that this abandonment led to a coerced plea.**

I. Second District Court Opinion

On October 17, 1975, the District Court issued its second and dispositive opinion in the case. The District Court rejected the abandonment claim and found any defect in the plea to be harmless error.

* There is a further suggestion in counsel's brief in the District Court that petitioner's counsel on the motion to withdraw the plea was also inadequate. The brief alleged that petitioner never saw his counsel prior to the hearing and did not know he would testify until the time of the hearing. However, respondent cannot find these alleged facts anywhere in the record. Now we are told (Br. 10, fn. 4) that petitioner has no such complaint. One of the problems in this case has, again, been respondent's inability to comprehend precisely what petitioner was complaining about.

** This is unclear, however. Petitioner's District Court counsel's brief third point heading refers to petitioner's alleged protestation of abandonment, not to an alleged actual abandonment. Counsel appeared to suggest that a hearing was necessary to ascertain the facts; he did not appear to suggest, as is apparently urged now by appellate counsel that "abandonment" has already been proved.

ARGUMENT

PETITIONER'S GUILTY PLEA WAS VOLUNTARY.

Petitioner's guilty plea was voluntary and unassailable under the most elementary principles of law as set forth by the Supreme Court of the United States and this Court. The cardinal principle is that the voluntariness of a guilty plea must be determined by an examination of "all the relevant circumstances." Brady v. United States, 397 U.S. 742, 749 (1970). Petitioner's suggestions to the contrary that his plea was involuntary are totally devoid of merit.

At the outset it must be noted that petitioner appears to be confused as to what is at issue in this case. Petitioner in his conclusion (Br. 23) asks that this Court order the Nassau County Court to allow petitioner to withdraw his plea. However, as the District Court noted, the question of whether a motion to withdraw a plea in a state court should be granted is a question of discretion not to be disturbed by a federal court on federal habeas review. United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 458, fn. 2 (2d Cir. 1970), cert. den. 401 U.S. 942 (1971);

United States ex rel. Best v. Fay, 239 F. Supp. 632 (SDNY) aff'd 365 F. 2d 832 (2d Cir. 1966), cert. den. 386 U.S. 998. The inquiry on federal habeas review, rather, must be whether the plea was voluntary. It is this question which respondent will address in this brief. The difference is not just one of semantics. The standards for voluntariness and withdrawal of a plea are not necessarily the same. The standard for the latter is the discretion of the trial court, both at the time the plea was entered here (New York Code of Criminal Procedure § 337) and at the time the motion to withdraw the plea was denied (New York Criminal Procedure Law 220.60). A trial court might in its discretion, for example, allow the withdrawal of a plea it deemed voluntary. Significantly, in asking the Nassau County Court to permit him to withdraw his plea, petitioner asks that Court to do that which it has no power to do since sentence has already been executed. CPL § 220.60.

In view of this analysis the question of exhaustion of available state remedies is "close". Lunz v. Henderson, 75-2079 ___ 2d ___, (2d Cir. Feb. 26, 1976), Slip Op. 2147, 2150 fn. 3; see also 2158, fn. 8. The question of the

withdrawal of the plea was presented to the state courts on direct appeal and collateral attack, but not specifically in terms of the voluntariness of the plea. At this point, an available state remedy probably no longer exists in the light of Judge Tomson's decision in the Nassau County Court on petitioner's motion to vacate his plea (Appendix J) although Judge Tomson's decision in turn suggests a strong possibility of waiver. Fay v. Noia, 372 U.S. 391 438 (1963). The District Court evidently thought there was sufficient exhaustion since it did not mention it. In any event, the basic underlying facts on review now were presented to the state courts.*

*Moreover, it is proper to assume that if the state courts considered the plea involuntary, permission to withdraw the plea would have been granted.

A. Petitioner understood the nature of the charges against him.

Petitioner argues that his plea was void because he did not understand the elements of the crime to which he pleaded, burglary in the first degree. In particular, it is claimed that the element of the commission of physical injury* was not understood by petitioner or was not communicated to him or was not admitted by him. This argument is totally devoid of merit.

The issue in this case is not whether petitioner failed to understand one formal legal of the crime to which he pleaded, but rather whether petitioner understood the "true nature of charge against him," Smith v. O'Grady, 312 U.S. 329, 334 (1941), or had a "full understanding of what the plea connotes." Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). See also McCarthy v. United States, 394 U.S. 459, 464 (1969).

*At his hearing on the motion to withdraw his plea, petitioner claimed that the missing element was an element of intent. App. H, 13-14. Nothing was ever said at this hearing about physical injury.

The precise meaning of "nature of the charge" or "what the plea connotes"* has received very little discussion in the cases or literature. However, it is clear that an accused need not necessarily have a full understanding or knowledge of all the formal legal elements of the crime in order to be apprised of the nature of the charge against him. In a recent interpretation of McCarthy v. United States, supra the Eighth Circuit ruled that there was no ritual requirement to inform a defendant of the elements and that it was not necessary to explain the elements in order to apprise the accused of the nature of the charge. Sappington v. United States, 468 F. 2d 1378 (8th Cir. 1972), cert. denied 411 U.S. 970 (1973). The Court denounced the effort "to transform an enunciation of general standards to an everlengthening list of specifics, the omission of any one of which will render the entire proceeding 'an exercise in futility' and stated that "McCarthy imposes no requirement that the Judge mount the bench with a script in his hand." Sappington, 468 F. 2d at 1379-1380.

*The phrase "what the plea connotes" appears essentially equivalent in meaning to "nature of the charge." Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 181, 184 (1969).

Similarly, the Seventh Circuit has ruled that only the substance of a charge and not the elements need be conveyed to the accused. United States v. Lowe, 367 F. 2d 44 (7th Cir. 1966). See also United States v. Semet, 295 F. Supp. 1084, 1087 (E.D. Okla. 1968). Other courts have ruled that reference to a crime by name or its general nature and essence may be sufficient to apprise an accused of the nature of the crime charged. Bongiorno v. United States, 424 F. 2d 373, 375 (8th Cir. 1970); People v. Reeves, 25 Ill. App. 3rd 674, 323 N.E. 2d 794 (1975); People v. Heral, 25 Ill. App. 3rd 806, 323 N.E. 2d 138 (1975). At least two federal Circuits have stated that knowledge of a charge in layman's terms may be sufficient. Stinson v. Turner, 473 F. 2d 913, 916 (10th Cir. 1973); United States v. Tabory, 462 F. 2d 352 (4th Cir. 1972).

The commentary to ABA Minimum Standards, § 1.4(a) stresses that the procedure will vary from case to case and may involve reading the indictment or explaining the nature of the charge in simple everyday language.

In short, no particular litany or procedure is required. How much and what kind of explanation of the nature of the charge may be required necessarily varies from case to case. McCarthy, supra, 394 U.S. at 467, n. 20; Eagle Thunder v. United States, 477 F. 2d 1326 (8th Cir.), cert. denied 414 U.S. 873 (1973).

Certainly, as was made clear in McCarthy, an understanding of the elements of a crime to which a defendant pleads guilty is an important factor to consider in ascertaining the voluntariness of the plea, especially where the charge encompasses lesser included offenses. McCarthy, 394 U.S. at 468, n. 20. However, in keeping with its flexible approach to guilty pleas, the Supreme Court in McCarthy never mandated that an accused be formally advised of all elements prior to a plea, and wisely noted that "matters of reality, and not mere ritual, should be controlling." McCarthy, 394 U.S. at 468, n. 20, quoting Kennedy v. United States, 397 F. 2d 16, 17 (6th Cir. 1968). The ABA Minimum Standards referred to in McCarthy, 394 U.S. at 466, n. 17, are also silent on whether an accused should be informed of

the formal legal elements of a crime prior to a plea. The commentary to the Approved Draft acknowledges that a plea is an admission of all the elements of the charge, and thus requires a "sophisticated knowledge of the law in relation to the facts", but adds that "no specific procedure is required." Thus, the precise contours of the defendant's "understanding of the law in relation to the facts" required by McCarthy remain to be delineated on a case by case basis.

Significantly, the McCarthy decision, relied on so extensively by petitioner, specifically did not reach any constitutional question and was rendered specifically in the exercise of the Supreme Court's supervisory powers over the federal courts. McCarthy, supra, at 464.

Consistent with this practical approach to guilty pleas approved by the Supreme Court, the great weight of authority in this country, both state and federal, holds that failure to advise a defendant of the elements of the crime to which he pleads does not, at least by itself, render a plea invalid. Sappington v. United States, supra; United States v. Lowe, supra (see also United States v. Podell, 519 F. 2d 144, 149 (2d Cir. 1975); Cabrera v. United States, 357 F. Supp. 1350 (SDNY 1972); United States v. Semet, supra;

State v. Ferrell, 108 Ariz. 394, 499 P. 2d 109 (1972) (en banc); People v. Vest, 43 Cal. App. 3rd 728, 118 Cal. Rptr. 84 (1974); People v. Krantz, 58 Ill. 2d 187, 317 N.E. 2d 559 (1974), reversing 12 Ill. App. 3rd 38, 297 N.E. 2d 386 (1973); People v. Jenkins, 27 Ill. App. 3rd 756, 327 N.E. 2d 294 (1975); People v. Baker, 60 Mich. App. 309, 230 N.W. 2d 409 (1975); Matthews v. State, 501 S.W. 2d 44, 48 (Mo. 1973); Contra, People v. Sanders, 524 P. 2d 299 (Colo. 1974) (en banc); Carvalho v. Olim, 519 P. 2d 892 (Haw. 1974); Coolen v. State, 288 Minn. 44, 179 N.W. 2d 81 (1970); Commonwealth v. Ingram, 455 Pa. 198, 316 A. 2d 77 (1974); McAllister v. State, 54 Wis. 2d 224, 194 N.W. 2d 639 (1972).

Properly viewed, the elements of a crime are counsel's focus for intelligent legal analysis of a criminal case. This analysis forms the basis of competent legal advice on which an accused has a right to rely. Provided counsel's advice is based on an analysis of the elements of the crime, which has never been denied in this case, a failure by court or counsel to recite them formally to the accused does not mean that the defendant is prejudiced or will not understand the nature of the charge.

Applying these principles to the case at bar, it is clear that the plea minutes and the minutes on the motion to withdraw the guilty plea demonstrate petitioner's general understanding of the nature of the charge of burglary. Facts constituting a burglary were elicited from petitioner's own mouth, on the record. That petitioner may not have known every single formal legal element of one degree of burglary does not mean he did not understand the nature of the charge against him. The petitioner admitted he took the plea on the recommendation of counsel.

The District Court concluded that petitioner's plea made out an admission of guilt to every element of burglary in the second degree. The District Court concluded that no admission was made out as to burglary in the first degree as to one missing element only. The difference here goes only to the degree of burglary, not to the question of burglary itself. Petitioner has never denied the general charge of burglary.*

*See Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. Law Rev. 142 (1970); Scheckloth v. Bustamonte, 412 U.S. 218, 250-275 (Powell, J. concurring); Ralls v. Manson, 503 F. 2d 491, 494 (Lumbard, J. concurring). In two cases argued in the Supreme Court on February 24, 1976, (Wolff v. Rice, 74-1222, Stone v. Powell, 74-1055), counsel for petitioners urged the Court to adopt the "colorable claim of innocence" rule espoused by Justice Powell in Schneckloth v. Bustamonte, supra, for purposes of federal habeas review.

Nor has petitioner ever claimed, except now in his brief (p. 17) on this appeal, that ignorance of the element of "physical injury" ever contributed to his decision to plead guilty. Cabrera v. United States, 357 F. Supp. 1380 (SDNY 1972). Accordingly, as the District Court quite correctly noted, this purported defect was harmless error.

Of course, even a defendant with knowledge of the elements of a crime could deny those elements and still plead guilty in a proper case. North Carolina v. Alford, supra; People v. Serrano, 15 N Y 2d 304, 309-310, 258 N.Y.S. 2d 386, 389-390; 206 N.E. 2d 330, 333 (1965). Indeed, under New York law, Harned could have entered a valid guilty plea to a hypothetical non-existent crime or a crime for which there is no factual basis as part of a reasoned, negotiated plea bargain. People v. Clairborne, 29 N Y 2d 950, 329 N.Y.S. 2d 580, 280 N.E. 2d 366 (1972); People v. Foster, 19 N Y 2d 150, 278 N.Y.S. 2d 603, 225 N.E. 2d 200 (1967). Under these circumstances, the purported failure to inform Harned of the formal legal elements of an actual crime was not materially significant where his plea in fact was clearly entered as part of a negotiated plea bargain.

Petitioner relies on this Court's decision in United States ex rel. Morgan v. Henderson, 516 F. 2d 897 (2d Cir. 1975), cert. granted 44 USLW 3178 (10/6/75). In Morgan, this Court affirmed, without benefit of any written opinion, a District Court ruling setting aside a guilty plea because of the trial court's failure to inform the accused of the elements of any degree of homicide. The effect of Morgan, however, is an open question, since the case was argued before the Supreme Court on February 24, 1976 and is presently sub judice. Moreover, Morgan was a case where the uncommunicated element was the essence of the crime charged. In the case at bar, the purported uncommunicated element went to the degree of burglary, not to the crime of burglary itself.

It remains to correct several erroneous factual assertions made by petitioner. Petitioner claims that Judge Altimari misinformed petitioner as to the law, by inaccurately suggesting that physical injury was irrelevant to the charge of first degree of burglary. Br. 16. Petitioner considers this the "most amazing aspect of this case." Br. 21.

What is "amazing" is petitioner's misapprehension, since in fact Judge Altimari never said or suggested that physical injury was irrelevant to the charge of first degree burglary. In fact Judge Altimari did not discuss physical injury one way or the other. Moreover, contrary to petitioner's understanding of the law, whether or not a rape was consummated was in fact not necessarily of consequence to the plea to burglary in the first degree. Br. 16. Petitioner admitted that he unlawfully entered the premises with intent to commit a crime, and he admitted that the crime he intended to commit was rape. The element of physical injury is not denied inferentially by the admission of intent to commit rape, since such injury could exist independent of a consummated rape.

Similarly, petitioner's claim that he denied committing any physical injury is another complete falsehood. (Br. 11, 17). Petitioner only denied rape. He neither denied, nor admitted, causing anyone physical injury.

B. Petitioner's guilty plea was the result of a reasoned decision knowingly and intelligently entered into on the advice of counsel.

The record is clear that petitioner pleaded guilty on the advice of counsel. Petitioner himself admits this. The record is also clear that petitioner pleaded guilty to one indictment in order to satisfy fully two indictments and in order to avoid exposure to severe penalties which might be attendant upon conviction after trial. Petitioner himself admits this. Petitioner also admits that as to the indictment to which he pleaded he was in fact guilty of burglary and had no defense to the charge. Petitioner also knew the scope of the punishment that was to be imposed as part of the plea bargain. Appendix F-5. In short, the plea was entered as part of a negotiated plea bargain, and a generous one at that.

Under all these circumstances, the plea was a voluntary and reasoned choice among alternatives made on the advice of counsel, North Carolina v. Alford, 400 U.S. 25, 31, 37 (1970), McMann v. Richardson, 397 U.S. 759 (1970), Kelleher v. Henderson, ___ F. 2d ___ (2d Cir. 1976) Slip Op. 2007 and must stand.

The plain truth is that in many cases guilty defendants are primarily concerned with the sentence rather than with a fine comparison of elements and facts, which was precisely the case with Harned. The motivations of a defendant who pleads guilty are an obvious and fundamental element in any realistic analysis of the voluntariness of a plea, especially where the motivations are strong ones, as was clearly recognized in Brady v. United States, supra, and North Carolina v. Alford, supra. Therefore, in assessing the voluntariness of a plea the courts must look not only to what a defendant knows in pleading guilty, but also to the rational motivations of the defendant for pleading guilty in the first place. See United States ex rel. Brown v. LaVallee, supra, at 460.

In this case, petitioner's plea to burglary in the first degree was an objectively sensible and rational alternative to standing trial for two separate rape indictments. Further, in the absence of any credible claim of prejudice, the purported lack of knowledge of a formal legal element did not alter the essential voluntariness of the plea made by petitioner in his own best interests. Cabrera v. United States, supra.

Significantly, petitioner has never claimed that his attorney's advice was objectively incorrect. The assistance and advice of counsel has long been recognized as a factor militating in a finding that a plea was entered voluntarily. Argersinger v. Hamlin, 407 U.S. 25, 34 (1972); Brady v. United States, supra; McMann v. Richardson, supra; Von Moltke v. Gillies, 332 U.S. 708 (1948); United States ex rel. Brown v. LaVallee, supra.

Of course, no counsel can give advice with absolute confidence that it will achieve the best results. As the Supreme Court has said, "(i)n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court . . . Questions like those cannot be answered with certitude." McMann v. Richardson, supra, 397 U.S. at 769-770 (1970). Thus, an accused is bound by his plea unless he can show a serious dereliction on the part of counsel. Id. at 774. No such dereliction has ever been shown or even alleged here.

Finally, the fact that petitioner was advised as to the consequences of his plea also militates in favor of a finding of voluntariness. Marvel v. United States, 380 U.S. 262 (1965); McCarthy v. United States, supra, 394 U.S. at 464; ABA Minimum Standards, § 1.4(c).

C. Petitioner was not "abandoned by his attorneys", nor did "parental pressure" render his plea involuntary.

Petitioner claims that he was "abandoned" by his attorneys and that he was subjected to pressure by his parents. All this is said to have contributed to the decision to plead guilty. These claims are without merit.

The abandonment claim is an afterthought by petitioner. It was not fully developed until petitioner's renewed application for habeas corpus.

Moreover, for purposes of federal habeas review, the claim has been waived. Petitioner had an opportunity to explore in depth the claim of abandonment at his evidentiary hearing on the motion to withdraw his plea. He failed to do so. The two attorneys he claimed abandoned him were not called as witnesses.

If any issues were not developed as they should have been, that is not the State's fault, and the matter has been waived absent a claim of incompetence of counsel. No such claim appears to be made now.*

Indeed, the failure to call these two attorneys at the hearing appears to have been deliberate strategy. On at least three occasions petitioner's counsel at the hearing objected to communications between petitioner and his then counsel although such communications would obviously be important to a claim of abandonment. Appendix H-6, 7, 16, 34. Indeed, it was the State's representative which tried to reach these communications and failed in the face of defense counsel's objections. Appendix H-34. This deliberate strategy cannot now be disavowed. Clearly, this is a case of waiver or deliberate by-pass of state court procedure, as the District Court correctly pointed out. Fay v. Noia, 372 U.S. 391, 438 (1963).

*Although such a claim has at times been raised below. See p. 13, n. 2, supra.

The claim fails on the merits. Petitioner's brief is very sparse as to exactly how petitioner's lawyers abandoned him. According to petitioner's brief (Br. 20), the attorneys "were saying they could do no more for him." However, according to petitioner himself in his letter to Judge Altimari of June 30, 1971, he was simply told that if he did not take the plea "immediately" he would be tried on the two indictments. This is hardly "abandonment"; on the contrary it constitutes legal advice and forecast by lawyers to a client. The fact that the forecast may have been unpleasant proves nothing; what is important is whether the advice was informed or accurate. There is no claim here that it was not.

Petitioner apparently attempted to supplement his abandonment claim when he returned to Nassau County Court for exhaustion purposes in June, 1974. See part "G", supra, p. 11.* Petitioner claimed that defense counsel did not wish to continue as defense counsel when petitioner refused to go along with his wishes. This is hardly abandonment; it is only an allegation of differences over strategy. Petitioner

*See appellee's Appendix "A".

also claimed that he lacked confidence in Legal Aid lawyers. The source of this lack of confidence was jailhouse "rumors" that such counsel were incompetent. This, too, certainly does not show any "abandonment" by his retained attorneys.

Petitioner also claims that he pleaded because of parental pressure. This, even if true, would not render the plea involuntary. A case remarkably similar to the case at bar is United States ex rel. Brown v. LaVallee, supra, conveniently ignored by petitioner. There it was claimed that a hysterical mother and several lawyers persuaded a defendant who claimed innocence to take a proffered plea in the face of "the realities of the situation." The Court held this did not affect the voluntariness of the plea. The identical principles apply to this case. See also Lunz v. Henderson, supra.

D. Petitioner was not deprived of a speedy trial.

Petitioner claims he was denied his right to a speedy trial on the first indictment to which he did not plead, and the denial of this right was a factor entering into his decision to plead guilty on the second indictment, to which he did plead.

The District Court correctly noted that a speedy trial claim is waived upon a plea of guilty.* Brady v. United States, supra at 748. This is certainly true for purposes of federal habeas review, Tollet v. Henderson, 411 U.S. 258, 267 (1973), especially where, as here, the right to raise a speedy trial claim after a guilty plea did not arise under New York law until after the plea in this case. See Newsome v. Lefkowitz, 95 S.Ct. 886, CPL 210.20(a).

The claim fails on the merits. Petitioner was actually incarcerated less than six months before his plea. The delay of nineteen months of trial on the first indictment is not so great as to be unconstitutional. See United States v. Lustman, 258 F. 2d 475, 477 (2d Cir.) cert. den. 358 U.S. 880 (1958); United States v. Infanti, 474 F. 2d 522 (2d Cir. 1973); United States v. Nathan, 476 F. 2d 456 (2d Cir. 1973); United States v. Cangiano, 491 F. 2d 906 (2d Cir. 1974); United States v. Iannelli, 461 F. 2d 483 (2d Cir. 1972), cert. den. 409 U.S. 980.

*The District Court also noted, and the respondent claimed below, that petitioner had not exhausted this point, an argument which was not challenged below.

There is nowhere in the record below any pre-trial demand for a speedy trial addressed to the Nassau County Court. There is no claim of any prejudice to the defense case as a result of the delay. Moreover, the first indictment was "covered" by the plea to the second, so no true prejudice could have been sustained. Applying the balancing test of Barker v. Wingo, 407 U.S. 514 (1972), the District Court correctly found no deprivation of a right to a speedy trial.

Petitioner's claim that the District Attorney deliberately reversed the chronological order of trial on his two indictments in order to extract a plea from him must be rejected. There is not a shred or evidence to support this assertion other than petitioner's conjecture. Significantly, petitioner had an opportunity to explore this matter at his hearing on his motion to withdraw his plea, but failed to do so. In any event, an accused obviously has no constitutional right to be tried for the crimes in a particular order.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
March 22, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
Of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 19th day of March, 1976, he served the annexed upon the following named person :

Jeffrey Ira Zuckerman
45 Wall Street
NY NY
10005

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ralph J McMurry

Sworn to before me this
19th day of March, 1976

Assistant Attorney General
of the State of New York